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HOUSE BILL 344

**48TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2008**

INTRODUCED BY

Brian K. Moore

AN ACT

RELATING TO ETHICS; ENACTING THE STATE ETHICS COMMISSION ACT;  
CREATING THE STATE ETHICS COMMISSION; PROVIDING POWERS AND  
DUTIES; GRANTING SUBPOENA POWER; ALLOWING ISSUANCE OF ADVISORY  
OPINIONS RELATED TO CERTAIN ETHICS VIOLATIONS; PROVIDING FOR  
THE FILING OF COMPLAINTS AGAINST STATE OFFICIALS, STATE  
EMPLOYEES, GOVERNMENT CONTRACTORS AND LOBBYISTS FOR CERTAIN  
ETHICS VIOLATIONS; ESTABLISHING INVESTIGATIONS OF COMPLAINTS  
FOR CERTAIN ETHICS VIOLATIONS; PROVIDING PENALTIES; MAKING AN  
APPROPRIATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the  
"State Ethics Commission Act".

Section 2. DEFINITIONS.--As used in the State Ethics  
Commission Act:

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1           A. "campaign contribution" means a gift,  
2           subscription, loan, advance or deposit of money or other thing  
3           of value, including the estimated value of an in-kind  
4           contribution, that is made or received for a political purpose,  
5           including payment of a debt incurred in an election campaign.

6           "Campaign contribution" does not include the value of services  
7           provided without compensation or unreimbursed travel or other  
8           personal expenses of persons who volunteer a portion or all of  
9           their time on behalf of a candidate or political committee, nor  
10          does it include the administrative or solicitation expenses of  
11          a political committee that are paid by an organization that  
12          sponsors the committee;

13                 B. "commission" means the state ethics commission;

14                 C. "commissioner" means a person appointed to the  
15                 state ethics commission;

16                 D. "ethics violation" means any action that amounts  
17                 to a violation of the Gift Act, the Governmental Conduct Act,  
18                 the Procurement Code, the Lobbyist Regulation Act, the  
19                 Financial Disclosure Act or Chapter 1, Article 19 NMSA 1978;

20                 E. "government contractor" means a person who has a  
21                 contract with a state agency pursuant to the Procurement Code.  
22                 "Government contractor" also includes any person who has  
23                 submitted a competitive sealed proposal or competitive sealed  
24                 bid for a contract with a state agency;

25                 F. "legislative body" means the house of

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1 representatives or the senate;

2 G. "lobbying" means attempting to influence:

3 (1) a decision related to any matter to be  
4 considered or being considered by the legislative branch of  
5 state government or any legislative committee or to any  
6 legislative matter requiring action by the governor or awaiting  
7 action by the governor; or

8 (2) an official action;

9 H. "lobbyist" means a person who is compensated for  
10 the specific purpose of lobbying; is designated by an interest  
11 group or organization to represent it on a substantial or  
12 regular basis for the purpose of lobbying; or who, in the  
13 course of the person's employment, is engaged in lobbying on a  
14 substantial or regular basis. "Lobbyist" does not include:

15 (1) a person who appears on the person's own  
16 behalf in connection with legislation or an official action;

17 (2) an elected or appointed officer of the  
18 state, a political subdivision of the state or an Indian  
19 nation, tribe or pueblo who is acting in the officer's official  
20 capacity;

21 (3) an employee of the state or a political  
22 subdivision of the state, specifically designated by an elected  
23 or appointed officer, who appears before a legislative  
24 committee or in a rulemaking proceeding only to explain the  
25 effect of legislation or a rule on that employee's agency or

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1 political subdivision; provided that the elected or appointed  
2 officer keeps the designation for public inspection and files  
3 it with the secretary of state;

4 (4) a designated member of the staff of an  
5 elected state official; provided that the elected state  
6 official keeps the designation for public inspection and files  
7 it with the secretary of state;

8 (5) a legislator or legislative staff member;

9 (6) a witness called by a legislative  
10 committee or administrative agency to appear before it in  
11 connection with legislation or an official action;

12 (7) a person who provides only oral or written  
13 public testimony in connection with a legislative committee or  
14 in a rulemaking proceeding and whose name and the interest on  
15 behalf of which the person testifies have been clearly and  
16 publicly identified; or

17 (8) a publisher, owner or employee of the  
18 print media, radio or television, while gathering or  
19 disseminating news or editorial comment to the general public  
20 in the ordinary course of business;

21 I. "official action" means an action or nonaction  
22 of a state official or state agency, board or commission acting  
23 in a rulemaking proceeding;

24 J. "political purpose" means influencing or  
25 attempting to influence an election or pre-primary convention,

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1 including a constitutional amendment or other question  
2 submitted to the voters;

3 K. "respondent" means a state official, state  
4 employee, government contractor or lobbyist who is the subject  
5 of a complaint filed with the commission;

6 L. "state agency" means any department, commission,  
7 council, board, committee, institution, agency, government  
8 corporation, educational institution or official of the  
9 executive, legislative or judicial branch of government of the  
10 state;

11 M. "state employee" means an employee of the  
12 executive, legislative or judicial branch of the state; and

13 N. "state official" means a person elected or  
14 appointed to an office of the executive, judicial or  
15 legislative branch of the state.

16 Section 3. STATE ETHICS COMMISSION CREATED--MEMBERSHIP--  
17 TERMS--REMOVAL.--

18 A. The "state ethics commission" is created as an  
19 adjunct agency. The commission consists of the following  
20 twelve commissioners:

21 (1) three commissioners appointed by the  
22 governor, one from each congressional district and no more than  
23 two of whom shall be of the same political party;

24 (2) four commissioners appointed by the  
25 legislature in the following manner; provided that no more than

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1 two commissioners shall be from the same congressional  
2 district:

3 (a) one commissioner appointed by the  
4 president pro tempore of the senate;

5 (b) one commissioner appointed by the  
6 minority floor leader of the senate;

7 (c) one commissioner appointed by the  
8 speaker of the house of representatives; and

9 (d) one commissioner appointed by the  
10 minority floor leader of the house of representatives;

11 (3) two commissioners appointed by the  
12 attorney general, who shall be attorneys who are licensed  
13 members in good standing of the state bar of New Mexico with  
14 experience in civil and criminal prosecution and defense and  
15 who shall not be:

16 (a) of the same political party; and

17 (b) appointed from the same  
18 congressional district;

19 (4) two commissioners appointed by majority  
20 vote of the supreme court, who shall be attorneys who are  
21 licensed members in good standing of the state bar of New  
22 Mexico with experience in civil and criminal prosecution and  
23 defense and who shall not be:

24 (a) of the same political party; and

25 (b) appointed from the same

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1 congressional district; and

2 (5) one commissioner appointed by the  
3 secretary of state.

4 B. Appointments shall be made in a manner that  
5 meets the following requirements:

6 (1) all commissioners shall be residents of  
7 New Mexico;

8 (2) no more than six commissioners shall be  
9 registered members of the same political party and no person  
10 whose party registration changed in the year prior to  
11 appointment shall be appointed to the commission; and

12 (3) the appointing authorities shall give due  
13 consideration to achieving geographical representation from  
14 across the state.

15 C. Commissioners shall be appointed for staggered  
16 terms of four years. Upon initial appointment of the  
17 commission, the commissioners shall draw lots to determine  
18 which four commissioners will serve an initial term of two  
19 years, which four commissioners will serve an initial term of  
20 three years and which four commissioners will serve an initial  
21 term of four years; thereafter, all commissioners will serve  
22 four-year terms. A person shall not serve as a commissioner  
23 for more than two consecutive terms.

24 D. The commission shall select a chair, vice chair  
25 and other officers it deems necessary.

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1           E. Seven commissioners constitute a quorum for the  
2 transaction of business. No action may be taken by the  
3 commission unless at least seven members concur.

4           F. A vacancy on the commission shall be filled by  
5 appointment of the appointing authority for that commissioner's  
6 position for the remainder of the unexpired term. A  
7 commissioner may only be removed for incompetence, neglect of  
8 duty or malfeasance in office. A proceeding for the removal of  
9 a commissioner may be commenced by the commission or by the  
10 attorney general upon the request of the commission. The  
11 supreme court of the state of New Mexico has exclusive  
12 jurisdiction over proceedings to remove commissioners, and its  
13 decision shall be final. A commissioner shall be given notice  
14 of hearing and an opportunity to be heard before the  
15 commissioner is removed.

16           G. During a commissioner's service, a commissioner  
17 shall not:

18                   (1) hold or seek an elective public office, an  
19 appointed public position or an office in a political party; or

20                   (2) be a state employee, a government  
21 contractor or a lobbyist.

22           H. Commissioners shall disqualify themselves from a  
23 commission proceeding that involves the appointing authority  
24 who appointed the commissioner to the commission or when a  
25 commissioner has a conflict of interest. Commissioners who

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1 disqualify themselves shall state the reason for the  
2 disqualification. If the propriety of a commissioner's  
3 participation in a particular matter is questioned due to a  
4 conflict of interest, the commission may disqualify that  
5 commissioner from participation in a commission proceeding. A  
6 disqualified commissioner shall not participate in any  
7 proceedings with reference to the matter from which the  
8 commissioner is disqualified, and the commissioner shall be  
9 excused from that portion of any meeting at which the matter is  
10 discussed. If four or more commissioners are disqualified from  
11 participating in a proceeding, the remaining commissioners  
12 shall appoint temporary commissioners to participate in that  
13 proceeding. Appointments of temporary commissioners shall be  
14 made by majority vote of the remaining commissioners and in  
15 accordance with the geographical representation and political  
16 party membership requirements of Subsections A and B of this  
17 section.

18 I. For a period of one calendar year following the  
19 expiration of a commissioner's term or following the  
20 resignation or removal of the commissioner, the commissioner  
21 shall not:

22 (1) hold or seek an elective public office, an  
23 appointed public position or public employment;

24 (2) represent a respondent, unless appearing  
25 on the commissioner's own behalf; or

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1 (3) accept employment or otherwise provide  
2 services to a person or entity that is a respondent, unless the  
3 commissioner accepted employment or provided services to the  
4 person or entity prior to the filing of a complaint against the  
5 person or entity.

6 J. Commissioners are entitled to receive per diem  
7 and mileage as provided in the Per Diem and Mileage Act and  
8 shall receive no other compensation, perquisite or allowance.

9 K. The commission shall meet as necessary to carry  
10 out its duties pursuant to the State Ethics Commission Act.

11 Section 4. COMMISSION--POWERS--DUTIES.--

12 A. The commission shall:

13 (1) receive and investigate complaints  
14 alleging ethics violations against state officials, state  
15 employees, government contractors and lobbyists;

16 (2) report findings of probable cause that a  
17 respondent's conduct constituted an ethics violation to the  
18 respondent's appointing authority, employer or appropriate  
19 state agency;

20 (3) compile, maintain and provide public  
21 access to an index of all advisory opinions, complaints and  
22 reports required to be made public pursuant to the State Ethics  
23 Commission Act;

24 (4) develop, adopt and promulgate all rules  
25 necessary to implement and administer the provisions of the

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1 State Ethics Commission Act, including rules of procedure for  
2 investigations conducted by the commission;

3 (5) employ an executive director;

4 (6) submit an annual report of its activities,  
5 including any recommendations regarding state ethics laws or  
6 the scope of its powers and duties, in December of each year to  
7 the governor, the legislature, the attorney general, the chief  
8 justice of the supreme court and the secretary of state; and

9 (7) promulgate rules for the recusal of  
10 members to avoid the appearance of impropriety and conflicts of  
11 interest.

12 B. The commission may:

13 (1) initiate complaints alleging ethics  
14 violations against state officials, state employees, government  
15 contractors and lobbyists;

16 (2) issue public reprimands or censures or  
17 recommend disciplinary actions in accordance with the  
18 provisions of the State Ethics Commission Act for ethics  
19 violations committed by state officials and state employees of  
20 the executive branch;

21 (3) subpoena and require the attendance of  
22 witnesses and the production of accounts, books, papers,  
23 records and other documents relevant to an investigation  
24 conducted by the commission;

25 (4) issue advisory opinions to state

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1 officials, state employees, government contractors and  
2 lobbyists in accordance with the provisions of the State Ethics  
3 Commission Act; and

4 (5) contract for the provisions of goods and  
5 services.

6 Section 5. EXECUTIVE DIRECTOR--DUTIES--EMPLOYMENT.--

7 A. The executive director of the commission shall:

8 (1) be employed by, report directly to and  
9 serve at the pleasure of the commission;

10 (2) hire a general counsel for the commission  
11 and all other personnel as may be necessary to carry out the  
12 responsibilities of the commission;

13 (3) perform all investigations on behalf of  
14 the commission;

15 (4) bring complaints and investigation results  
16 before the commission for consideration;

17 (5) prepare an annual budget for the  
18 commission and submit it to the commission for approval; and

19 (6) make recommendations to the commission of  
20 proposed rules or legislative changes needed to provide better  
21 administration of the State Ethics Commission Act.

22 B. The executive director of the commission may  
23 administer oaths and take depositions to the same extent and  
24 subject to the same limitations as would apply if the  
25 deposition were held pursuant to the discovery rules in a civil

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1 action in the district court.

2 C. For a period of one calendar year immediately  
3 following the executive director's employment with the  
4 commission, the executive director's shall not:

5 (1) hold or seek an elective public office, an  
6 appointed public position or public employment;

7 (2) represent a respondent, unless appearing  
8 on the executive director's own behalf; or

9 (3) accept employment or otherwise provide  
10 services to a person or entity that is a respondent, unless the  
11 executive director accepted employment or provided services to  
12 the person or entity prior to the filing of a complaint against  
13 the person or entity.

14 Section 6. COMMISSION--ADVISORY OPINIONS.--

15 A. The commission may issue an advisory opinion to  
16 a state official, state employee, government contractor or  
17 lobbyist on matters relating to a specific set of circumstances  
18 involving ethics violations. Unless amended or revoked, an  
19 advisory opinion issued by the commission shall be binding on  
20 the commission in any subsequent commission proceedings  
21 concerning the person who requested the opinion; provided that  
22 the person acted in good faith and in reliance upon the  
23 opinion.

24 B. The commission shall promulgate rules for  
25 issuing advisory opinions; provided that:

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1 (1) advisory opinions shall be requested in  
2 writing and identify a specific set of circumstances involving  
3 an ethics issue;

4 (2) all requests to the commission for  
5 advisory opinions are confidential; and

6 (3) the commission may publish an advisory  
7 opinion after omitting the name of the requesting state  
8 official, state employee, government contractor or lobbyist.

9 Section 7. COMMISSION--COMPLAINTS--INVESTIGATIONS--  
10 FINDINGS AND RECOMMENDATIONS--REPORTS REQUIRED--CRIMINAL  
11 REFERRAL REQUIRED.--

12 A. A complaint of an alleged ethics violation  
13 committed by a state official, state employee, government  
14 contractor or lobbyist may be:

15 (1) filed with the commission by a person who  
16 has actual knowledge of an alleged ethics violation; or

17 (2) initiated by the commission upon receipt  
18 of evidence deemed sufficient by the commission of an alleged  
19 ethics violation.

20 B. A person who files a complaint with the  
21 commission shall sign the complaint under penalty of false  
22 statement and set forth in detail the specific charges against  
23 the state official, state employee, government contractor or  
24 lobbyist and the factual allegations that support the charges.  
25 Together with the complaint, a person shall submit to the

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1 commission any evidence that the person has that supports the  
2 complaint. Evidence may include documents, records and the  
3 names of witnesses. The commission may prescribe the forms on  
4 which complaints are to be filed.

5 C. The chair of the commission shall sign a  
6 complaint initiated by the commission, and the complaint shall  
7 set forth in detail the specific charges against the state  
8 official, state employee, government contractor or lobbyist and  
9 the factual allegations that support the charges.

10 D. Upon receipt of a complaint filed or initiated  
11 pursuant to this section, the executive director of the  
12 commission shall examine the complaint and make an initial  
13 determination whether the conduct alleged in the complaint is  
14 within the jurisdiction of the commission and warrants  
15 investigation. The executive director shall bring all  
16 complaints before the commission and make recommendations to  
17 the commission regarding whether to proceed with investigations  
18 of the complaints.

19 E. The commission may dismiss complaints that are  
20 frivolous, unfounded or outside the jurisdiction of the  
21 commission. If the commission determines there is sufficient  
22 cause to proceed with the investigation of a complaint, the  
23 executive director shall initiate an investigation to determine  
24 whether probable cause may exist to believe the respondent's  
25 alleged conduct constituted an ethics violation. As soon as

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1 practicable, the executive director shall notify the person who  
2 filed the complaint and the respondent of the disposition of  
3 the complaint. The executive director shall also notify the  
4 respondent of the general nature of the complaint and the  
5 investigation.

6 F. As part of the investigation, the executive  
7 director may interview witnesses and examine books, documents,  
8 records and papers reasonably related to the complaint. All  
9 testimony in an investigation shall be under oath, and the  
10 respondent shall have the right to be represented by legal  
11 counsel. If the executive director determines that the  
12 testimony of any person or the production of books, documents,  
13 records or papers is required in the investigation, the  
14 executive director shall request that the commission issue the  
15 appropriate subpoena.

16 G. The commission may issue subpoenas for the  
17 attendance and testimony of witnesses or the production of  
18 books, documents, records and papers reasonably related to the  
19 complaint. Subpoenas may be signed by the chair of the  
20 commission and shall state with reasonable certainty the nature  
21 of the investigation, the nature of the information to be  
22 produced, the time and place where the information shall be  
23 produced and the consequences of failure to obey the subpoena.  
24 After service of the subpoena upon the person, if the person  
25 neglects or refuses to comply with the subpoena, the commission

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1 may apply to a district court for an order compelling  
2 compliance.

3 H. The executive director shall present a written  
4 report of the investigation to the commission. The respondent  
5 and the respondent's legal counsel may attend the meeting, and  
6 the executive director shall provide reasonable notice to the  
7 respondent in writing of the date, time and place of the  
8 meeting. Notwithstanding the provisions of the Open Meetings  
9 Act, meetings of the commission held for the purpose of an  
10 investigation conducted pursuant to this section are closed to  
11 the public.

12 I. If the commission finds that, based on the facts  
13 in the investigation report and the facts alleged in the  
14 complaint, probable cause exists to believe that the  
15 respondent's alleged conduct constituted an ethics violation,  
16 the commission shall issue a written report of its findings.  
17 The report shall include findings of fact and conclusions of  
18 law. If the respondent is a state official or state employee  
19 of the executive branch, the written report may include a  
20 public reprimand or censure regarding the respondent's behavior  
21 or recommendations for disciplinary action against the  
22 respondent.

23 J. The commission shall publicly disclose a report  
24 issued pursuant to Subsection I of this section. The  
25 commission shall also transmit the report and provide all

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1 evidence collected during its investigation to the respondent,  
2 the attorney general and the:

3 (1) respondent's appointing authority if the  
4 respondent is a state official appointed to an office of the  
5 executive branch;

6 (2) appropriate legislative body, in the care  
7 of the legislative council service, if the respondent is a  
8 legislator;

9 (3) judicial standards commission if the  
10 respondent is a judge or a justice;

11 (4) appropriate state agency if the respondent  
12 is a state employee;

13 (5) respondent's employer if the respondent is  
14 a lobbyist; or

15 (6) state agency with which the respondent has  
16 a government contract if the respondent is a government  
17 contractor.

18 K. If the commission finds that, based on the facts  
19 in the investigation report and the facts alleged in the  
20 complaint, probable cause does not exist to believe that the  
21 respondent's alleged conduct constituted an ethics violation,  
22 the commission shall dismiss the complaint and provide a report  
23 of its finding in writing to the respondent no later than five  
24 days after the finding is made. The report shall include  
25 findings of fact and conclusions of law. A commission report

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1 issued pursuant to this subsection shall not be public except  
2 upon the request of the respondent.

3 Section 8. COMMISSION INVESTIGATIONS--CONFIDENTIALITY.--

4 A. All complaints, files, records and  
5 communications collected by the commission that pertain to  
6 investigations of ethics violations are confidential and not  
7 subject to the provisions of the Inspection of Public Records  
8 Act. The commission, a commissioner, an employee of the  
9 commission or any other person shall not disclose any  
10 complaints, files, records or communications unless:

11 (1) disclosure is required pursuant to the  
12 provisions of the State Ethics Commission Act;

13 (2) the complaints, files, records or  
14 communications are offered into evidence at any judicial,  
15 legislative or administrative proceeding;

16 (3) disclosure is required by law or ordered  
17 by a court; or

18 (4) the respondent files with the commission a  
19 written waiver of confidentiality.

20 B. A person who discloses any confidential  
21 complaints, files, records or communications in violation of  
22 this section is guilty of a misdemeanor and upon conviction  
23 shall be punished by a fine of not more than one thousand  
24 dollars (\$1,000) or by imprisonment for not more than one year  
25 or both.

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1           Section 9. CRIMINAL VIOLATIONS--REFERRAL REQUIRED.--If  
2 the commission finds at any time that the respondent's conduct  
3 may amount to a criminal violation of state law, the commission  
4 shall immediately refer the matter to the attorney general or  
5 an appropriate district attorney. The commission shall provide  
6 the attorney general or district attorney with all evidence  
7 collected during its investigation that may be used in a  
8 criminal proceeding. Nothing in this subsection shall prevent  
9 the commission from taking any action otherwise provided in the  
10 State Ethics Commission Act.

11           Section 10. COMPLAINTS AND INVESTIGATIONS--TIME  
12 LIMITATIONS.--

13           A. If the commission has not scheduled a meeting  
14 concerning the disposition of a complaint within ninety days  
15 after the complaint is received or initiated by the commission  
16 or has not disposed of the complaint within twelve months after  
17 the complaint was received or initiated, the commission shall  
18 dismiss the complaint and notify the respondent in writing of  
19 the dismissal.

20           B. A dismissal of a complaint pursuant to this  
21 section shall not be public except upon the request of the  
22 respondent.

23           Section 11. ETHICS VIOLATIONS--STATUTE OF LIMITATIONS.--  
24 The commission shall not consider a complaint against a state  
25 official, state employee, lobbyist or government contractor

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1 unless the complaint is filed or initiated within three years  
2 from the date on which the ethics violation occurred.

3 Section 12. PROHIBITED ACTIONS.--

4 A. A person shall not take or threaten to take any  
5 retaliatory, disciplinary or other adverse action against  
6 another person who in good faith:

7 (1) files a complaint with the commission  
8 alleging an ethics violation against a state official, state  
9 employee or lobbyist; or

10 (2) provides testimony, records, reports or  
11 other information to the commission during an investigation  
12 conducted pursuant to the State Ethics Commission Act.

13 B. Nothing in the State Ethics Commission Act  
14 precludes civil actions or criminal sanctions for libel,  
15 slander or other civil or criminal claims against a person who  
16 files a false claim under that act.

17 Section 13. TEMPORARY PROVISION--REPORT ON EXTENSION OF  
18 STATE ETHICS COMMISSION JURISDICTION TO LOCAL GOVERNMENTS.--By  
19 January 1, 2012, the state ethics commission shall submit a  
20 report to the governor, the legislature, the attorney general,  
21 the chief justice of the supreme court and the secretary of  
22 state regarding the extension of state ethics commission  
23 jurisdiction to elected and appointed officials and employees  
24 of counties, municipalities and school districts. The report  
25 shall include and make recommendations on:

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1           A. a detailed plan formulated by the commission for  
2 implementation of an extension of its jurisdiction, including a  
3 proposed timeline;

4           B. the estimated number of additional employees and  
5 the amount and type of resources needed by the state ethics  
6 commission to carry out its powers and duties if its  
7 jurisdiction were extended;

8           C. all estimated budget increases needed and the  
9 estimated annual budget for the state ethics commission if its  
10 jurisdiction were extended; and

11           D. any changes that are needed to existing law.

12           Section 14. APPROPRIATION.--Five hundred thousand dollars  
13 (\$500,000) is appropriated from the general fund to the state  
14 ethics commission for expenditure in fiscal year 2009 to carry  
15 out the provisions of the State Ethics Commission Act. Any  
16 unexpended or unencumbered balance remaining at the end of  
17 fiscal year 2009 shall revert to the general fund.

18           Section 15. APPLICABILITY.--The provisions of the State  
19 Ethics Commission Act apply to a state official, state  
20 employee, government contractor or lobbyist who commits an  
21 ethics violation on or after July 1, 2008.

22           Section 16. EFFECTIVE DATES.--

23           A. The effective date of the provisions of Sections  
24 1 through 5, 8 and 11 through 15 of this act is July 1, 2008.

25           B. The effective date of the provisions of Sections

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1 6, 7, 9 and 10 of this act is January 1, 2009.

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